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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LESTER EUGENE SANDERS, Defendant and Appellant.	F074543 (Super. Ct. No. VCF328646) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. H. N. Papadakis, Judge. (Retired Judge of the Fresno Super. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Lester Eugene Sanders attacked his mother in her bedroom one morning with a broom, a cell phone and broken glass. He was arrested several hours later and charged with willful, deliberate and premeditated attempted murder (Pen. Code, §§ 664/187, subd. (a))[1] (count 1), two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) (count 2 (broom) and count 3 (broken glass)), assault by means of force likely to produce great bodily injury (GBI) (§ 245, subd. (a)(4)) (count 4 (cell phone)), dissuading a witness (§ 136.1, subd. (b)(1)) (count 5), and mayhem (§ 203) (count 6). Prior to trial, the court dismissed the mayhem charge and, following the prosecution's case-in-chief at trial, it also dismissed the charge of dissuading a witness. The jury convicted defendant of attempted murder, the lesser offense of simple assault on count 2, assault with a deadly weapon and assault by means of force likely to produce GBI. The jury found the special allegation that the attempted murder was willful, deliberate and premeditated not true, and it found the enhancement for personal infliction of GBI attached to counts 1 and 3 true. (§ 12022.7, subd. (a).) In a bifurcated proceeding, the trial court found true that defendant suffered a prior serious felony conviction for robbery (§ 667, subd. (a)(1)) and served two prior prison terms (§ 667.5, subd. (b)).[2]

The trial court sentenced defendant to the aggravated term of 9 years for attempted murder (count 1), doubled to 18 years under the Three Strikes law, plus an additional three years for personal infliction of GBI, five years for the prior serious felony conviction enhancement, and two years for the two prior prison term enhancements, for a total determinate term of 28 years in prison. The court imposed the aggravated term of

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[1] All further statutory references are to the Penal Code.

[2] As discussed, *post*, section 667 was amended effective January 1, 2019. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) approved by Governor, Sept. 30, 2018, ch. 1013, § 1 (Sen. Bill No. 1393).) Subdivision (c)(5) of section 667.5 was also amended effective January 1, 2019, but that amendment is not relevant to the issues raised in this appeal. (Sen. Bill No. 1494, approved by Governor, Sept. 14, 2018 (2017-2018 Reg. Sess.) ch. 423, § 65.)

four years for assault with a deadly weapon (count 3), doubled to eight years, plus an additional 10 years for the three enhancements, for a total consecutive, determinate term of 18 years; and the aggravated term of four years for assault by means likely to produce GBI (count 4), doubled to eight years, plus an additional two years for the prior prison term enhancements, for a total consecutive, determinate term of 10 years. The court stayed the sentences on counts 3 and 4 under section 654, and it did not impose any time for count 2, the misdemeanor assault conviction.

On appeal, defendant challenges his conviction for attempted murder. He claims the trial court erred in instructing the jury, resulting in confusion that prejudiced him with respect to the jury's finding that he had the specific intent to kill his mother. The People respond that defendant forfeited his claim by failing to object to the jury instructions, but, in any event, the trial correctly instructed the jury and any arguable error was harmless.

Additionally, pursuant to Government Code section 68081, we requested the parties brief whether this matter should be remanded to allow the trial court to exercise its discretion to strike defendant's prior serious felony conviction given the recent amendments to sections 667 and 1385 effective January 1, 2019. (Sen. Bill No. 1393, ch. 1013, §§ 1, 2.) The parties agree the amendments to sections 667 and 1385 apply retroactively to judgments not final on appeal, but disagree over whether remand is appropriate. Defendant requests remand while the People maintain remand is unnecessary because it is clear from the record that the trial court would not have exercised its discretion to strike the enhancement.

We reject defendant's claim of instructional error. However, we agree with him that this matter should be remanded so that the trial court may exercise its discretion in the first instance with respect to whether to strike the prior serious felony conviction enhancement. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*); *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428 (*McDaniels*).)

FACTUAL SUMMARY

I. Prosecution's Case

A. T.R.'s Testimony

At the time of the crime in December 2015, defendant was living with his mother, T.R., and her husband following his release from jail approximately two weeks earlier. T.R. testified that defendant was 16 years old when he began using drugs and he first went to rehab at the age of 17. Their relationship was stressful in her view because defendant constantly used drugs and he stole from her. T.R. testified that they had argued previously about his drug use and thefts and, several times over the months preceding the crime, she told him she did not want him living with her.[3] While she did not start a formal eviction process, she called the authorities a few months before the crime because he was using drugs. In describing their arrangement, T.R. testified she cooked for defendant but did not give him any money, and while he would mop the floor sometimes, he did not pay for rent or food.

The morning of the crime, T.R. woke up with a bad headache. It was the fourth night defendant had paced all night and slammed doors, and she did not sleep. It was close to Christmas and defendant's daughter, A.S., who was on winter break from school, was also staying at her grandparents' house. T.R.'s husband left for work hours earlier and after T.R. got ready for work, she made plans to pick up breakfast for A.S.

T.R. was in her bedroom and A.S. was reading a book on T.R.'s bed when defendant entered the room with a large push broom. T.R. asked him what he was doing and he responded, "I'm going to kill you." Defendant then hit T.R. with the head of the broom multiple times, causing her to fall to the floor next to the bed. A.S. jumped on defendant's back and yelled at him to stop. T.R. told her to run. Defendant shook A.S.

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[3] T.R. testified that she told defendant she wanted him to leave several times between September and December, but neither their precise living arrangement prior to his release from jail nor the length of time he spent in jail during that period is clear from the record.

off and, referring to T.R., said, "I'm going to kill her." He then started hitting T.R. on the top of her head with her cell phone.

T.R. told A.S. to call the police. During the struggle, defendant dropped the phone. Defendant next took a drinking glass from T.R.'s nightstand and began hitting her with it. After the glass broke, he started stabbing her with the broken glass. Defendant told her she was going to die a third time while he was trying to cut her throat.

T.R. testified she was on the floor next to her bed on her stomach. Defendant was on top of her with his hands on her neck and he pushed her head into some bedding that had fallen on the floor. T.R.'s leg started shaking, her breathing was shallow, and she started seeing black. She fought back but defendant kept pushing her head down and did not stop. T.R. testified she thought she was going to die.

After defendant dropped the cell phone, A.S. grabbed it, ran from the house and called 911. The police arrived while defendant was pushing T.R.'s head into the bedding and he fled the house when he heard them.

T.R. spent four days in the hospital, two in intensive care. She sustained stab wounds to her forehead, chin, cheek, throat and finger, and required stitches to her head, throat, and finger. She suffered from severe headaches, soreness and bruising for a while, and her finger, which was cut deeply, was still numb at the time of trial.

T.R. testified that on the morning of the crime, defendant's eyes, which were normally bluish green, were big and black, and he looked like he was angry. On cross-examination, she said he had scabs on his arms and face, and she had seen him mumble to himself and laugh approximately two to three times over the days or week that preceded the attack. She stated that she did not see him mumble or laugh to himself the morning of the attack, but he had done so during the four-day period preceding the attack. T.R. also testified on cross-examination that they had not argued that morning or the night before, and the attack surprised her, as defendant had never threatened her before even though they had been alone in the house previously.

B. A.S.'s Testimony

A.S.'s account of the attack was materially similar to her grandmother's account, although she testified that T.R. was on her back on the floor when defendant was trying to choke her. A.S., who was 14 years old at the time of trial, saw defendant enter T.R.'s bedroom and hit T.R. more than once with the broom he had in his hand. He also hit T.R. with her cell phone, which he had taken away from A.S. A.S. saw defendant grab the glass and, after it broke, hit T.R. with broken glass. A.S. testified she saw T.R. bleeding and she saw defendant choking T.R. as she lay on the floor. A.S. also testified she heard defendant tell T.R. he was going to kill her approximately three times and call T.R. a "son of a bitch."

A.S. testified that the attack on her grandmother was not preceded by any argument, but defendant looked angry. She said defendant was walking around and laughing to himself, which was not normal, but she did not hear him slamming doors. She also said she could tell he was on drugs because he was always on drugs.

C. Other Evidence

Officers from the Tulare County Police Department responded to T.R.'s residence and forced entry into the house by kicking down the front door. A woman was heard screaming and officers located T.R. lying on the floor of her bedroom, face up. Her head was bleeding and there was broken, bloody glass next to her. T.R. was in shock and hyperventilating, but she did not lose consciousness. She told officers her son did this to her and he was on drugs. She said she did not know why he attacked her.

Approximately two hours later, defendant was located and detained while walking around. He was wearing a bloody sweatshirt and his hands were bloody. Defendant was calm and cooperative with officers. The officer who initially detained him was trained in drug recognition and testified defendant did not show any signs of intoxication. The second officer at the scene described defendant as dazed, fidgety and quiet, and testified

he did not ask any questions when he was arrested or during his transport to the police station.

The officer who transported defendant to the hospital testified defendant did not speak, he appeared very relaxed, and he was very calm. At the hospital, defendant told medical staff he did not know how he was injured. After the officer told staff the injuries may have come from glass, defendant asked, "Is there still glass in there?" Defendant needed a few stitches, but he refused treatment.

At the police station, defendant was calm and Officer Kelly, who knew defendant and his family through prior contacts, testified defendant did not show any signs of intoxication and, for that reason, Kelly did not evaluate defendant for intoxication. Defendant was calm and he stated he had not used "anything" for three to four days. Defendant did not ask about T.R. or A.S., but he asked officers if they were mad at him.

II. Defense Case

Dr. Avak Howsepian, a psychiatrist, testified for the defense as an expert in the psychiatric effects of methamphetamine (meth) and the effects of sleep deprivation. He informed the jury that meth is an extremely addicting stimulant and people who abuse it go on "runs" where they use the drug for days or weeks, and it is not uncommon for them to stay up for days at a time during a run. He also explained that, frequently, chronic users build up a tolerance to the drug and require greater amounts to achieve the same effect but some people, in a minority of cases, build a sensitization to it. The effects of meth, and meth intoxication, include visual and auditory hallucinations, impulsivity, insomnia, agitation, hostility, aggression, violence, memory problems and impaired judgment; and individuals with meth-induced psychosis experience visual or auditory hallucinations, paranoia to the point of delusion and belief they are being threatened, and grandiosity. Within the psychiatric community, the generally accepted view is that meth users are more prone to violence. This is because users often feel invincible; they are highly energized, act impulsively and are paranoid; and their judgment is distorted.

Dr. Howsepian testified the acute psychiatric effects of meth typically last four to 16 hours. In a minority of cases, they can last one to two days and, in an even smaller minority of cases, they can last a lifetime. Someone under the influence might be more active or more inactive than normal, and enlarged pupils, sweating and pacing are signs of intoxication, but one may also be under the influence without showing those signs. Although scabbing from picking at the skin is a sign of meth use, Dr. Howsepian explained that usage cannot be dated based on scabbing. He also explained that meth use does not necessarily equate to meth intoxication or impairment, or with "really robust[,] significant symptoms."

Dr. Howsepian met with defendant twice to evaluate him, but defendant was not cooperative and terminated both meetings. Therefore, Dr. Howsepian had limited information with which to complete an evaluation of defendant. During the evaluations, defendant maintained poor eye contact, said almost nothing responsive and did not interact normally. Dr. Howsepian stated he had very rarely encountered a criminal defendant who would not cooperate; defendant's behavior was the opposite of malingering, and he was possibly psychotic and needed further evaluation, but, because he would not permit it, Dr. Howsepian did not have enough information to diagnose him. Dr. Howsepian opined that defendant was "a very impaired young man who wasn't able or willing to cooperate with [the] exam."

Defendant's blood was drawn approximately six hours after police responded to T.R.'s house. The toxicology report reflected 56 nanograms per milliliter of meth and 28 milligrams per milliliter of amphetamine, and Dr. Howsepian testified that 56 nanograms of meth is slightly above the therapeutic range, which is typically 35 to 50 nanograms per milliliter.[4] Dr. Howsepian testified that he could not determine based on the report whether defendant was under the influence of meth or whether he last used meth that day

[4] Officer Kelly testified that defendant's blood was drawn primarily for DNA testing, pursuant to standard protocol, but also because defendant's family had mentioned drug use.

or a few days earlier, but the ratio of meth to amphetamine in his blood was "classic for someone who has been using methamphetamine repeatedly" and, even at 56 nanograms per milliliter, defendant could still have been feeling the effects of meth. He also testified that he could not say how high defendant's levels were six hours before the blood draw, but he estimated they were 25 to 50 percent higher.

Given a hypothetical mirroring defendant's behavior prior to the attack and during the attack, Dr. Howsepian opined that such behavior was "robustly consistent with someone who is under the influence of methamphetamine." He also testified that defendant's behavior after the attack when he was located walking around was consistent with someone under the influence of meth.

Dr. Howsepian reviewed defendant's interview tape and noted he was not very verbal, he maintained poor eye contact and he had visible scabs. Dr. Howsepian testified that someone paranoid or psychotic will maintain poor eye contact, give short answers and act guardedly or evasively, and defendant's behavior in the video was "quite consistent" with someone under the influence of meth. He also stated that the absence of enlarged pupils, sweat and pacing did not mean defendant was no longer under the influence of meth.

III. Rebuttal

On rebuttal, Officer Kelly testified that he had met defendant both when he was and was not under the influence of drugs. Kelly testified defendant had always been calm and polite during their interactions. Defendant was usually reserved but was more talkative when he was under the influence. Kelly also testified that someone who used drugs three or four days earlier would be on the "downside" and preparing to use again.

DISCUSSION

I. Claim of Instructional Error

A. Summary of Parties' Positions

Relevant to defendant's instructional challenge, the trial court instructed the jury pursuant to CALCRIM No. 252 (union of act and intent: general and specific intent together), CALCRIM No. 600 (attempted murder), CALCRIM No. 601 (attempted murder: deliberation and premeditation), and CALCRIM No. 3426 (voluntary intoxication). The focus of defendant's claim is his conviction for attempted murder, which required the jury to find he acted with the specific intent to kill. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 665.)

Defendant argues that the court's instruction on the concurrence of union and intent (CALCRIM No. 252) incorrectly stated the law and that the court omitted language from its instruction on voluntary intoxication (CALCRIM No. 3426), rendering the instruction grammatically incorrect and confusing. He contends that "[t]he jumble of concepts in [CALCRIM Nos. 252, 600, 601 and 3426] on intent made it more likely than not that the jury was confused about how little difference there is between specific intent to kill and premeditation, and therefore the verdict of attempted murder is unreliable and should be reversed." He maintains that the jury's findings that he had the specific intent to murder his mother but that he did not act willfully, deliberately and with premeditation are inconsistent, which suggests the jury was confused by the court's instructions.

The People respond that defendant forfeited any claim of instructional error by failing to object in the trial court. Alternatively, they argue the court instructed the jury correctly and any error was harmless.

B. Standard of Review

We review defendant's claim of instructional error review de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) "In criminal cases, even in the absence of a request, a trial court must instruct on general

principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) "[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677; accord, *People v. Thomas* (2011) 52 Cal.4th 336, 356.) "If the charge as a whole is ambiguous, the question is whether there is a '"reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 (per curiam).) Jurors are presumed to have understood and followed the trial court's jury instructions. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

"'"[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated" in *Watson*.'"[5] (*People v. Beltran* (2013) 56 Cal.4th 935, 955; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 919.) "[W]e inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights." (*People v. Rogers* (2006) 39 Cal.4th 826, 873; accord, *People v. Friend* (2009) 47 Cal.4th 1, 79.)

C. Forfeiture

With respect to forfeiture, defendant concedes he did not object to the jury instructions in the trial court, but points out that objection is not required where the deficiency affects substantial rights. (§ 1259; *People v. Delgado* (2017) 2 Cal.5th 544, 572, fn. 15; *People v. Townsel* (2016) 63 Cal.4th 25, 59–60.) The People do not dispute that errors affecting substantial rights do not require an objection to preserve the issue for

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5 As discussed, *post*, defendant claims the errors are of constitutional magnitude and, therefore, the more stringent federal standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) applies.

appeal, but they deny that the alleged errors identified by defendant affected his substantial rights.

A claim that an instruction misstates the law, resulting in a due process violation, does not need to be preserved by an objection. (*People v. Smithey* (1999) 20 Cal.4th 936, 976–977, fn. 7.) However, we need not decide whether the forfeiture doctrine applies in this instance, because, as we explain, any error was harmless. (*People v. Johnson* (2016) 62 Cal.4th 600, 639; accord, *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 919.)

D. Summary of Relevant Jury Instructions

1. CALCRIM No. 252: Union of Act and Intent

The trial court instructed the jury pursuant to CALCRIM No. 252 as follows, with the challenged portions italicized:

> "*The crime charged in Count 1 requires proof of the union or joint operation of act and wrongful intent.* The following crimes and allegations require general criminal intent: Assault with a deadly weapon, the broomstick, as charged in Count 2. Assault with a deadly weapon, broken glass, as charged in Count 3 and as charged in Count 4. [¶] For you to find a person guilty of these crimes or find the allegation true, that person must not only commit the prohibited act but must do so with *wrongful intent*. A person acts with wrongful intent when he or she intentionally does a prohibited act. However, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime or allegation.
>
> "The following crimes and allegation require specific intent: Attempted murder as in Count 1. For you to find a person guilty of these crimes or to find the allegation true, that person must not only intentionally commit the prohibited act but must do so with a specific intent." (Italics added.)

2. CALCRIM No. 600: Attempted Murder

The trial court instructed the jury pursuant to CALCRIM No. 600 as follows:

> "The defendant is charged in Count 1 with attempted murder. To prove the defendant is guilty of attempted murder, the People must prove that: One, the defendant took a direct but ineffective step toward killing another person. And two, the defendant intended to kill that person.

"A direct step requires more than merely planning and preparation to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation, and shows that a person is putting his or her plan into action.

"A direct step indicates a definite but unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt."

3. CALCRIM No. 601: Deliberation and Premeditation

The trial court instructed the jury pursuant to CALCRIM No. 601 as follows:

"If you find the defendant guilty of attempted murder in Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation.

"The defendant acted willfully if he intended to kill when he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill.

"The defendant premeditated if he decided to kill before acting. The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances.

"A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

"The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved."

4. CALCRIM No. 3426: Voluntary Intoxication

Finally, the trial court instructed the jury pursuant to CALCRIM No. 3426 as follows, with the challenged portion italicized:

> "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with intent to kill [T.R.] *You may consider evidence whether the defendant acted with deliberation and premeditation.*
>
> "A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect.
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> "In connection with the charge of attempted murder, the People have the burden of proving beyond a reasonable double that the defendant acted with specific intent to kill [T.R.] If the People have not met this burden, you must find the defendant not guilty of attempted murder.
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> "Additionally, the People have the burden of proving beyond a reasonable doubt that the defendant acted willfully and with deliberation and premeditation. If the People have not met this burden, you must find the allegation it was done willfully and with deliberation and with premeditation not true.
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> "You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to assault with a deadly weapon or assault with force likely to produce great bodily injury." (Italics added.)

E. Analysis

1. Instruction on Union of Act and Intent

a. Errors Claimed

"In criminal law, there are two descriptions of criminal intent: general intent and specific intent. 'A crime is characterized as a "general intent" crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a "specific intent" crime when the required mental state entails an intent

to cause the resulting harm.' (*People v. Davis* (1995) 10 Cal.4th 463, 518–519, fn. 15.) 'General criminal intent thus requires no further mental state beyond willing commission of the act proscribed by law.'" (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1172–1173, quoting *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) The trial court is required "to instruct on all of the elements of a charged offense [citations], including the mental state required to commit the offense and the union of that mental state and the defendant's act [citations]." (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1160, citing *People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1185; accord, *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1499.)

Where, as here, a defendant is charged with both general intent and specific intent crimes, the applicable CALCRIM instruction on the union of act and intent is No. 252.[6] In this case, defendant argues that the first sentence of the instruction as read by the trial court was inaccurate and misleading, the deficiency was exacerbated by the subsequent reference to "wrongful intent" in the paragraph addressing general intent crimes, and the deficiency was not cured by the paragraph that followed, informing the jurors that attempted murder is a specific intent crime. Defendant contends that in using the term "wrongful intent" to refer to both mens rea and the mental state for general intent crimes, the instruction confused and misdirected the jury.

Defendant takes issue with the first sentence in the instruction, which he claims informed the jury that it could convict him of attempted murder without finding intent to kill. We agree that the trial court erred when it listed only count 1 in the first sentence; it should have listed counts 1 through 4, thereby informing the jury that as to each count, it

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6 If the charged crimes are limited to general intent offenses, CALCRIM No. 250 applies, and if the charged crimes are limited to specific intent offenses, CALCRIM No. 251 applies. As the Court of Appeal explained in *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1325, these instructions "derive[] from … section 20, which provides: 'In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.' This statute relates to the mens rea elements of offenses and links the mens rea element to the actus reus element."

had to find a union of act and wrongful intent. (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 872–873 [court erred when it instructed jury pursuant to CALJIC No. 3.31 that voluntary manslaughter is a specific intent crime]; *People v. Alvarez* (1996) 14 Cal.4th 155, 219–220 [in instructing the jury on which offenses required specific intent pursuant to CALJIC No. 3.31, the court erred in failing to include the murder charge]; *People v. Saavedra* (2018) 24 Cal.App.5th 605, 612–613 [court erred when, in instructing the jury pursuant to CALCRIM No. 252, it listed as a general intent offense a count that required specific intent].) We disagree with defendant, however, that this error, whether we consider it separately or in conjunction with the instruction's subsequent use of the term "wrongful intent" in the second paragraph, which we address next, confused or otherwise misled the jury, resulting in prejudice to him. (*People v. Rogers*, *supra*, at p. 873 [error harmless]; *People v. Alvarez*, *supra*, at p. 220 [error harmless]; *People v. Saavedra*, *supra*, at pp. 615–616 [error harmless beyond a reasonable doubt].)

Turning to the language of CALCRIM No. 252, in *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1189 (*Ibarra*), this court rejected the claim that the instruction misstates the law on the union of act and intent. In that case, as here, the defendant bolstered his claim by negatively comparing the language of CALCRIM No. 252 with the corollary CALJIC instruction.[7] The court observed that the defendant's argument "intimates that CALJIC instructions serve as the benchmark by which to adjudicate the correctness of CALCRIM instructions. Not so." (*Ibarra*, *supra*, at p. 1189, citing *People v. Thomas* (2007) 150 Cal.App.4th 461, 465–466 ["The Judicial Council's adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as

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[7] In this case, defendant compares CALCRIM No. 252 with CALJIC No. 3.31.5, which provides in relevant part: "In the crime[s] charged in Count[s] , and [or which [is a] [are] lesser crime[s] thereto], [namely, , and ,] there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed."

superior."]; see *People v. Calistro* (2017) 12 Cal.App.5th 387, 402 [CALCRIM instructions are generally viewed as superior].)

While the defendant in *Ibarra* also targeted the first sentence of CALCRIM No. 252, we recognize that the specific argument advanced in *Ibarra* did not require the court to focus on the "wrongful intent" language. (See *Ibarra*, *supra*, 156 Cal.App.4th at p. 1189.) Nevertheless, defendant neither acknowledges the decision nor cites to any authority supporting his argument of error advanced in this appeal. Regardless, even if we assume for the sake of argument that the pattern instruction here would benefit from greater precision so as to avoid the double use of the phrase "wrongful intent" when referring both to the union of actus reus and mens rea and to the mental state required for general intent crimes where specific intent crimes are also charged, we do not agree the deficiency caused defendant any prejudice. (See *People v. Martinez* (2007) 154 Cal.App.4th 314, 336–337 [use of same phrase—conscious disregard for human life—in concurrence instruction and in defining implied malice was not error].)

b. Error Harmless

The California Supreme Court has explained that "the presumption that jurors understand and follow trial court instructions" is "a '"crucial assumption"'—one that '"underl[ies] our constitutional system of trial by jury."' [Citations.] In some circumstances, courts understandably find grounds to consider this presumption rebutted—when the risk that the jury will not follow instructions is sufficiently pronounced. [Citation.] But we tend to apply such exceptions narrowly and do not extend them without good reason." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 205–206.)

Here, notwithstanding the first sentence of the instruction, the trial court informed the jury that attempted murder is a specific intent crime, and that specific intent would be defined in later instructions. It then subsequently instructed the jury that the People were required to prove defendant had the intent to kill. (*People v. Gonzalez*, *supra*, 54 Cal.4th at pp. 664–665.) Defendant acknowledges as much but argues that "it is quite likely that

the jurors would simply follow the first sentence [of the instruction] in considering the issue of specific intent, which misstates the law.…" This argument overlooks that "[t]he instructions must be viewed in the context of all the instructions given to the jury 'rather than in artificial isolation.'" (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1013; accord, *People v. Hardy* (2018) 5 Cal.5th 56, 97 [error in including a specific intent crime among general intent crimes rather than specific intent crimes harmless where trial court also instructed that torture is a specific intent crime and prosecutor argued to the jury that she must prove specific intent as to that offense]; *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 919 [trial court's failure to include murder counts among the other specific intent crimes it listed harmless where "[o]ther instructions adequately conveyed the requirement, and there is no reasonable probability that a more explicit instruction would have affected the outcome of the trial."].)

The jury here was instructed, pursuant to CALCRIM No. 225 on circumstantial evidence, that "[t]he People must prove not only that the defendant did the acts charged but also that … he acted with a particular intent," and the jury was referred to the instruction for each crime. The jury was also instructed that attempted murder is a specific intent crime pursuant to CALCRIM No. 252 and it was instructed on the elements of attempted murder pursuant to CALCRIM No. 600, which include the intent to kill. As such, the jury was adequately informed as to the intent required to convict defendant of attempted murder. Moreover, both the prosecutor and defense counsel informed the jury during closing argument that attempted murder requires a finding of intent to kill. In particular, defense counsel repeatedly discussed specific intent to kill in the context of the attempted murder count.

Defendant does not contend otherwise but argues the instructions were nevertheless confusing and misleading. We are unpersuaded. This was a straightforward case and, as defendant acknowledges, the critical issue was his intent. Defendant attacked his mother, unprovoked, with three different objects; stated three times that he

was going to kill her; and did not stop attacking her until officers arrived at the house. Under these circumstances, it took no leap of logic for the jury to conclude that when he attacked his mother, he did so with the specific intent to kill her.

We do not agree with defendant that the jury's finding that he did not do so willfully, deliberately and with premeditation is at odds with its determination that he intended to kill her. Trial counsel argued the absence of a motive, highlighting for the jury the evidence that T.R. was surprised by the attack and stated that she did not know why defendant attacked her. In addition, counsel argued that the improvised use of the head of a broom, a cell phone and a glass as weapons and the commission of the act in front of a witness—defendant's own teenage daughter—pointed to actions that were rash, impulsive and without careful consideration rather than actions that were deliberate and premeditated. As well, there was evidence of defendant's meth use. While the jury necessarily rejected defendant's voluntary intoxication defense with respect to the attempted murder charge, it may have considered that evidence more persuasive as it related to the issue of premeditation. Defendant's contrary argument notwithstanding, the jury's findings here do not cause us any concern with respect to confidence in the verdict.

Viewing the instructions as a whole and taking into consideration the arguments of counsel, it is not reasonably likely that any error in instructing pursuant to CALCRIM No. 252 had any effect on the jury's determination that defendant acted with the specific intent to kill his mother. (*People v. Hardy*, *supra*, 5 Cal.5th at p. 97 [applying reasonable probability standard and concluding error in instructing on union of act and intent harmless where jury otherwise adequately instructed and prosecutor argued crime required specific intent]; *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 919 [applying reasonable probability standard to error relating to CALJIC No. 3.31.5 and finding error harmless where other instructions adequately conveyed the mental state requirement]; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 221 [finding error in instructing jury on union

of act and intent harmless where another instruction "substantially covered the concurrence of act and 'specific intent'"]; *People v. Lua*, *supra*, 10 Cal.App.5th at p. 1014 ["[T]he parties' closing arguments … diminished any possibility of confusion."].) Nor do we reach a different result under the federal standard articulated in *Chapman*, which defendant argues applies because the error deprived him of due process under the Fourteenth Amendment to the United States Constitution.

Under *Chapman*, we "must determine whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 831, citing *Neder v. United States* (1999) 527 U.S. 1, 18; accord, *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 663). "[I]n order to conclude that an instructional error '"did not contribute to the verdict"' within the meaning of *Chapman* [citation] we must '"find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."'" (*People v. Brooks* (2017) 3 Cal.5th 1, 70.) For the reasons already discussed, we conclude that the asserted errors in CALCRIM No. 252 were harmless beyond a reasonable doubt when viewed in the context of the instructions as a whole, the evidence the jury considered and counsels' arguments. (*People v. Saavedra*, *supra*, 24 Cal.App.5th at pp. 615–616 [finding error in instructing jury on union of act and intent harmless beyond a reasonable doubt where another instruction covered both intent and concurrence of act and intent].)

2. Voluntary Intoxication Instruction

Defendant also claims the trial court made a grammatical error when it read the instruction on voluntary intoxication and this grammatical error exacerbated the other errors he raises concerning intent. The People point out that "'[m]isreading instructions is at most harmless error when[, as here,] the written instructions received by the jury are correct.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1212, disapproved on another ground by *People v. Martinez*, *supra*, 47 Cal.4th at p. 948, fn. 10; accord, *People v. Grimes*

(2016) 1 Cal.5th 698, 729; *People v. Osband* (1996) 13 Cal.4th 622, 687.) Defendant responds that reliance on *People v. Box* is misplaced because, in this case, the instructions were, as a whole, confusing and misleading.

In the second sentence of its instruction to the jury on voluntary intoxication, the court stated, "You may consider evidence whether the defendant acted with deliberation and premeditation." As defendant contends, the court erred in omitting words from the second sentence and it should have stated, "You may consider *that* evidence *only in deciding* whether the defendant acted with deliberation and premeditation." (CALCRIM No. 3426, italics added.) We have determined that defendant's claim of prejudicial error relating to the issue of intent lacks merit and, therefore, the People's reliance on *People v. Box* is apt in this instance. The error complained of was confined to the court's oral recitation of the voluntary intoxication instruction and the jury was given a copy of the written instructions, including the complete, correct instruction on voluntary intoxication. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212.)

In any event, we also find any error harmless under either standard of review. The jury was otherwise correctly instructed on the issue of voluntary intoxication and it found the premeditation allegation not true. As we have stated, we do not agree that the errors defendant asserts with respect to CALCRIM No. 252 and the issue of intent resulted in any prejudice to him and consideration of the court's oral error with respect to the voluntary intoxication instruction does not alter our analysis. Any suggestion that the grammatical error in the second sentence of the instruction, made orally, somehow confused the jury with respect to the issue of voluntary intoxication and the attempted murder charge is untenable. One, the jury had a grammatically correct, written copy of the instruction for use during deliberations, as we have stated. Two, the asserted error must be viewed through the lens of the instructions as a whole and counsels' arguments, which made clear that the evidence of voluntary intoxication could be considered in determining whether defendant acted with the specific intent to kill.

II. Imposition of Five-year Sentence for Serious Felony Enhancement

A. Background

At the time of sentencing, the trial court was required to impose a five-year enhancement under former section 667, subdivision (a)(1), based on defendant's prior serious felony conviction for robbery. However, effective January 1, 2019, section 1385 was amended to permit a trial court, in the furtherance of justice, to strike or dismiss a five-year enhancement under subdivision (a)(1) of section 667. (Sen. Bill No. 1393, ch. 1013, § 1–2.) As previously stated, the parties agree that the amendments to sections 667 and 1385 apply retroactively in this case and we do not further address that issue. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973; *McDaniels, supra,* 22 Cal.App.5th at p. 424 [analyzing analogous amendment to firearm enhancement statute pursuant to Sen. Bill No. 620].) They do not agree, however, on whether remand for resentencing is required in this case. (*People v. Garcia, supra,* at pp. 971–973; *McDaniels, supra,* at pp. 424–428.)

B. Analysis

In support of their argument that remand is not necessary in this instance, the People cite *McDaniels* and *People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey*) for the proposition that remand is not required where "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] … enhancement." (*McDaniels, supra,* 22 Cal.App.5th at p. 425.) As discussed in both decisions, the relevant proposition was articulated by the Court of Appeal in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, in which the court was tasked with determining whether reconsideration of sentencing was required after the California Supreme Court held in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 that trial courts have the discretion to strike prior convictions. (*People v. Gutierrez, supra,* at p. 1896.)

The defendant in *People v. Gutierrez* was 34 years old, and he attacked two men who were at least 30 years older than he was, resulting in convictions for robbery and attempted robbery. (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) The trial court imposed a total aggregate sentence of 18 years 4 months and, during sentencing, the court stated the defendant "was 'clearly engaged in a pattern of violent conduct, which indicates he is a danger to society.'" (*Ibid.*) Further, in the context of deciding whether to impose two one-year enhancements under former section 667.5, subdivision (b), the trial court stated, "'[T]here really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.'" (*People v. Gutierrez*, *supra*, at p. 1896.)

In this case, in contrast, the trial court expressed no comment when it imposed the prior serious felony conviction enhancement. Moreover, the California Supreme Court recently reiterated that, "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1391.)

Post-*Guiterrez*, most of the published cases considering whether remand is appropriate to allow the trial court to exercise its discretion in the first instance have concluded that remand is appropriate, including *McDaniels*, cited by the People. (*People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973 [Sen. Bill No. 1393]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109–1111 [Sen. Bill No. 620 applying to firearm enhancement]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081–1082 [Sen. Bill

No. 620]; *McDaniels, supra*, 22 Cal.App.5th at pp. 427–428 [Sen. Bill No. 620].) In the minority is *McVey*, also cited by the People.

In that case, the Court of Appeal found that remand "would serve no purpose but to squander scarce judicial resources." (*McVey, supra*, 24 Cal.App.5th at p. 419, citing *People v. Fuhrman* (1997) 16 Cal.4th 930, 946 and *People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) The defendant in *McVey* shot a homeless man multiple times, killing the victim, and he received an aggregate sentence of 16 years 8 months. (*McVey, supra*, at pp. 409–410.) The Court of Appeal noted that in imposing a 10-year term for the firearm enhancement, the trial court "described [the defendant's] attitude as 'pretty haunting'" and stated, "'[T]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.'"[8] (*McVey, supra*, at p. 419.)

We do not minimize defendant's crimes in this case and we recognize that the trial court rejected defense counsel's plea for leniency and elected to impose the aggravated terms, but the disposition in *McVey* should not be divorced from its context: the victim was shot to death, the single enhancement imposed comprised the majority of the defendant's 16 year 8 month prison sentence and, unlike in this case, the trial court expressly commented on its imposition of the aggravated firearm enhancement term. (*McVey, supra*, 24 Cal.App.5th at p. 419.) Notably, in *People v. Almanza*, the Court of Appeal initially affirmed judgment and declined to remand the matter to the trial court in light of Senate Bill No. 620. It then granted rehearing, concluding, "We are persuaded … by *McDaniels* and defense counsel that speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence. This is the

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8 The firearm enhancement at issue in *McVey* was section 12022.5, subdivision (a), which provides: "Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

case when there is a retroactive change in the law subsequent to the date of the original sentence that allows the trial court to exercise discretion it did not have at the time of sentence." *(People v. Almanza, supra,* 24 Cal.App.5th at pp. 1110–1111.) We concur.

Although the record indicates the trial court was not sympathetic in this case, and not without good reason, it remains that at the time defendant was sentenced, the court lacked the discretion to strike or stay the prior serious felony enhancement. Defendant is entitled to be sentenced in the exercise of informed discretion and remand is appropriate so that the trial court may exercise its discretion in the first instance in light of the amendments to sections 667 and 1385, notwithstanding the trial court's determination that the aggravated terms were appropriate. We express no opinion on how the trial court should exercise its discretion on remand. (*McDaniels, supra,* 22 Cal.App.5th at p. 428.)

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under Penal Code sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2, eff. Jan. 1, 2019) and, if appropriate following exercise of that discretion, to resentence defendant accordingly. The judgment is otherwise affirmed.

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MEEHAN, J.

WE CONCUR:

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HILL, P.J.

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POOCHIGIAN, J.